

Defenders of Wildlife Friends of the Sea Otter
The Humane Society of the United States Oceans Public Trust Initiative

July 7, 2009

Doug Krofta
Public Comments Processing
Attn: FWS--R7--ES--2008--0105
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

**RE: Designation of Critical Habitat for the Southwest Alaska Distinct Population
Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*), 74 Fed. Reg. 27271
(June 9, 2009)**

Dear Mr. Krofta:

Defenders of Wildlife, Friends of the Sea Otter, The Humane Society of the United States, Oceans Public Trust Initiative (a project of Earth Island Institute's International Marine Mammal Project), and World Wildlife Fund appreciate the opportunity to comment on the Fish and Wildlife Service's (FWS) proposed rule to designate critical habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (SADPS), 74 Fed. Reg. 27271 (June 9, 2009). We have reviewed the revised proposed rule, the draft economic analysis (DEA), and the public comments submitted by other parties, and submit these comments in response to these new documents and as a supplement to those previously submitted on February 17, 2009 (Defenders of Wildlife, Friends of the Sea Otter, Oceans Public Trust Initiative, World Wildlife Fund) and February 12, 2009 (The Humane Society of the United States).

Our organizations incorporate by reference our previous comments and do not repeat these recommendations here. Nevertheless, we do wish to re-emphasize the importance of the accounting for the impact of climate change in this and future critical habitat designations. The dangers of climate change for species living in northern regions, such as the SADPS, are particularly significant as their habitat is likely to undergo the most significant modifications. As we discuss in more detail below, critical habitat is intended to provide for the conservation of the species, defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Endangered Species Act] are no longer necessary." 16 U.S.C. § 1532(3). Because of the devastating impacts on wildlife climate change and ocean acidification are likely to have, FWS must fully account for these factors in its designation and ongoing management of critical habitat.

In addition, we note that recently Defenders of Wildlife was asked to be a collaborator on a project proposal by Dr. Tim Tinker, Jim Bodkin et al, *Forecasting Changes to Eastern Pacific Nearshore Ecosystem Health in Response to Climate Change and Ocean Acidification*. The emphasis of this project proposal highlights the need to better understand the potential impacts of climate change to sea otters and their prey species, as well as other species that inhabit the Pacific nearshore ecosystem. As we noted in our initial comments, new information related to the impacts of climate change such as the

information expected to be gained through this study should be incorporated into management activities in a timely manner, including possible changes to the SADPS critical habitat designation to account for changing habitat characteristics and recovery forecasts. For now, however, the FWS must use the best scientific data available and not defer action based on uncertainty surrounding climate change and its impacts. *See* 16. U.S.C. § 1533(b)(2).

FWS Should Expand its Proposal to Provide for the Conservation of the Species

Based on the plain language of the Endangered Species Act (ESA), courts have emphasized that critical habitat must provide for the recovery in addition to the survival of a listed species, and therefore that conservation requires broader protections than simple avoidance of jeopardy to the species. *See, e.g., Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2007). Indeed, the Ninth Circuit Court of Appeals recently struck down a critical habitat determination as arbitrary and capricious primarily because it did not adequately consider the recovery needs of the listed species. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 934 (9th Cir. 2007). Therefore, it is essential that FWS consider not only the survival but also the recovery needs of the SADPS in its identification of primary constituent elements (PCEs), resulting designation of critical habitat, and in any cost-benefit analysis it undertakes when deciding whether or not to exclude an area from the critical habitat designation.

We noted in our initial comments that FWS's critical habitat proposal may not provide sufficient habitat for the recovery of the species due, in part, to its limited designation of PCEs pursuant to 50 C.F.R. § 424.12(b), and we reiterate these concerns here. In addition, we respond to the State of Alaska's contention that areas should only be identified as critical habitat if they contain all PCEs identified by FWS, which we believe to be completely at odds with the requirements of the ESA. Joint FWS and National Marine Fisheries Service (NMFS) regulations interpret the ESA to require the relevant agency to "focus" on the principal biological or physical constituent elements that are essential to the conservation of the species. The regulations also allow the agency to designate an inclusive area as critical habitat when it contains multiple habitats meeting the definition of critical habitat. 50 C.F.R. § 424.12(d). Courts have recently confirmed that an area may contain one or more, but not all, PCEs, and still be essential for the conservation of the species and therefore eligible for critical habitat designation. *See Home Builders Ass'n v. U.S. Fish and Wildlife Serv.*, 2007 U.S. Dist. LEXIS 5208 at 28-30 (E.D. Cal. 2006); *Ariz. Cattle Growers Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1030 (D. Ariz. 2008). As species often require habitats with a range of physical and biological features to meet the range of a species' needs, we support and encourage FWS to expand the general approach it has taken in its proposal and reject the recommendation of the State of Alaska to designate as critical habitat only areas containing all identified PCEs.

We also note that the ESA defines critical habitat as including areas both occupied and unoccupied by the listed species at the time of its listing. 16 U.S.C. § 1532(5)(A). Areas occupied by the species are considered critical habitat if they include physical or biological features essential to the conservation of the species, and if they *may* require special management considerations or protection. *Id.* Although the FWS has limited its proposed critical habitat to only areas occupied by the SADPS, the ESA requires that unoccupied areas be included in critical habitat if they are "essential for the conservation of the species." *Id.*

As stated in our previous comments, although we believe the FWS has thoroughly analyzed certain aspects of the critical habitat needs for the SADPS, there are some holes in the designation that the agency must fill. The biggest among these are the limited designation of PCEs to focus on sheltering, rather than other activities and elements essential to the conservation of the species, and the failure to designate unoccupied habitat. The designation of unoccupied habitat becomes even more important in the face of global warming due to possible shifts in range and food resources that may affect the species. As described in more detail in our other comments, we encourage FWS to revisit its designation of PCEs and reconsider the designation of unoccupied habitat in light of these circumstances.

FWS Should Minimize Exclusions from Critical Habitat

In addition to the requirements listed above, the ESA also requires the FWS to “[take] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). The ESA allows the FWS, but *does not* require it, to exclude an area from critical habitat if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” *Id.* However, no area may be excluded from critical habitat designation if its exclusion will result in the extinction of the listed species. *Id.* The regulations also specify that only the impact of proposed or ongoing activities in the area may be considered, implying that overly speculative impacts should not be considered in the cost-benefit analysis. 50 C.F.R. § 424.19.

The Costs of Critical Habitat Designation will be Minimal

There has been extensive debate in the courts regarding whether in critical habitat designations the FWS must consider all economic impacts associated with the listing and protection of a listed species, or whether it should only consider those additional costs imposed by the designation of critical habitat itself. Compare *N.M. Cattle Growers Ass’n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001) with *Ariz. Cattle Growers Ass’n v. Kempthorne*, 534 F. Supp. 2d 1013 (D. Ariz. 2008) and *Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). In light of the Ninth Circuit’s ruling in *Gifford Pinchot* that critical habitat designation in fact provides an additional benefit from the listing of a species alone, “[t]o find the true cost of a designation, the world with the designation must be compared to the world without it,” *Cape Hatteras*, 344 F. Supp. 2d at 130. In other words, only the incremental economic impacts of designation should be weighed in the agency’s cost-benefit analysis. Including the economic costs of conservation activities that would occur even if critical habitat were not designated (for example, ESA jeopardy consultations required by virtue of the species being listed) is contrary to the plain language of the ESA.

We support the basic structure of the DEA and its focus on an incremental rather than baseline analysis. We note, however, that the Executive Summary tables could use some further explanation of the distinction between these types of analyses and which is the appropriate consideration of cost under the ESA’s critical habitat inquiry. For example, Table ES-3 uses the baseline approach that incorporates all costs of species listing protection and may be misleading to the reader, even though Table ES-4 uses the appropriate incremental approach intended under the ESA and endorsed by the courts. In addition, we note that the DEA makes no serious attempt to quantify the benefits of critical habitat designation for the SADPS, which must also be taken into account in a comprehensive economic analysis. The DEA references the directly relevant work of John Loomis on the economic benefits of Southern Sea Otter protection in California (Loomis, John B. 2006.

Estimating recreation and existence values of sea otter expansion in California using benefit transfer. *Coastal Management* 34(4):387-404), but argues, and in some cases simply claims, that Loomis' findings are not relevant to the SADPS.

Specifically, the DEA claims that the SADPS does not generate any tourism benefits and associated economic values because “the more remote nature of sea otter habitat in Southwest Alaska does not [allow for accessible viewing opportunities]” (p. 8.5). This statement is not supported by any evidence. Although the area proposed for designation does not experience the level of sea otter viewing from tourist boats, kayaks, fishing boats and land as the South Central part of the state, including the Kenai Peninsula, it is not free from tourism activity. Thus, sea otters almost certainly do produce tourism-related benefits. It appears that, in stark contrast to the cost side, no efforts were undertaken to collect information that might have allowed quantification of these benefits.

Likewise, the DEA does not attempt to develop estimates of the potential passive use (non-use) values associated with critical habitat designation for the sea otter SADPS. Rather, it simply states that “[u]nfortunately, it is not known how critical habitat designation for the northern sea otter will impact this species population levels. In fact, there are limited projected changes in resource use that would be expected to reduce impacts on the otter in this region” (p.8-5). Of course, even “limited” impacts on population levels may have substantial associated passive use value, due to the very large number of beneficiaries, that is, of people placing existence values on sea otters. Given that the ESA is a Federal law that aims to protect the interest of the public at large, the beneficiaries to be counted in this analysis include all individuals in the United States who derive value from the knowledge that sea otters exist and are maintained for future generations. Thus, even if only a relatively small share of the total U.S. population holds passive use values for sea otters, the total number of beneficiaries is still likely to be large in absolute terms. Furthermore, peer-reviewed research has documented that the willingness to pay for species conservation, though a decreasing function of the distance of an individual from the species' habitat, extends over very long distances (Loomis, John B. 2000. Vertically summing public good demand curves: An empirical comparison of economic and political jurisdictions. *Land Economics* 76(2): 312-321.). Thus, even small changes in the population of a threatened or endangered species can generate large welfare impacts. Therefore, even if the designation of critical habitat for SADPS has “limited” population impacts, which we do not concede, that still would not imply that the economic value of these impacts is negligible. Unfortunately, based on the information provided in the DEA, it appears the DEA did not even attempt to construct a range of potential population changes that might result from critical habitat designation. Expert interviews might have allowed generation of such a range of potential population changes, which in turn would have allowed for the development of a range of (low and high) estimates of the associated economic values. The uncertainty of these population impact estimates is itself not a sufficient reason to not attempt to construct such estimates as EAs routinely make a series of assumptions when constructing cost estimates.

The DEA does note the overall incremental costs of critical habitat designation are expected to be very low and almost exclusively administrative. This analysis reflects, in part, the fact that the designation of critical habitat will not in and of itself result in any direct restriction of economic or other activity. Rather, the designation will identify habitat areas that must be considered in ESA Section 7 consultations to determine whether federally authorized activities are likely to result in the destruction or adverse modification of critical habitat, in addition to the jeopardy analysis triggered by the presence of listed species under Section 7. The balancing analysis regarding the benefits of including or excluding specific areas in the critical habitat designation must therefore be based on

this reality rather than on speculative assumptions that any area designated will be closed to private or federally authorized activity. No public commenters have pointed to the existence of Habitat Conservation Plans (HCPs) or other federally approved management measures that could serve to increase the benefits of exclusion. Weighed against the benefits that critical habitat designation would provide to the SADPS, we believe that very few, if any, exclusions are appropriate.

The FWS may only exclude areas that otherwise meet the requirements for critical habitat if the benefits of excluding an area outweigh the benefits of designating the area as critical habitat. This is a discretionary requirement, reflecting the broad goals of species protection implemented by the ESA. As noted previously, joint FWS and NMFS regulations limit the consideration of impacts on proposed or ongoing activities. 50 C.F.R. § 424.19. Exclusions based on speculations about potential economic impacts are inappropriate. The ESA provides for revisions of critical habitat designation if necessary should these activities become specific plans. 16 U.S.C. § 1532(a)(3).

Finally, in addition to limiting its considerations of economic impacts to non-speculative activities, we again remind FWS that it must focus even its cost-benefit analysis on the ESA's mandate to provide for the recovery of a species in its critical habitat designation. As discussed above, what distinguishes the jeopardy standard for a listed species from the adverse modification standard for its critical habitat is that critical habitat must provide for the recovery of a listed species, not solely for its survival. Extensive exclusions from the proposed critical habitat for the SADPS requested in other public comments will not ensure the recovery of the species.

In addition to the preceding general comments, we offer the following specific comments to several categories of activities requested for exclusion by other parties.

Economic Activities

The State of Alaska and the Resource Development Council (RDC) request significant exclusions from critical habitat designation based on the economic impacts of critical habitat designation. Both argue that the economic impacts of designation of certain areas would be significant. For example, the RDC implies that critical habitat designation will completely shut down the logging industry in the Kodiak archipelago¹; however, this contradicts the minimal economic impacts predicted by the DEA. Additionally, neither Alaska nor the RDC point to any federally enforceable protection measures as providing additional benefits in the face of exclusion.

The existing “protections” identified by the State of Alaska do not, in fact, provide equivalent protections to critical habitat designation and can not be seen to obviate the potential need for “special management considerations or protection,” 16 U.S.C. § 1532(5)(A)(i). Indeed, many of the mitigation efforts that Alaska cites as providing sufficient protection for the SADPS are not even targeted to protect the identified PCEs. For example, Alaska cites as a protection measure that in certain areas, “[t]o minimize impacts to important waterfowl habitats . . . exploration, development, and major maintenance . . . will only be allowed between November 16 and April 6.” (Alaska comments submitted February 17, 2009, page 10). A measure presumably geared to migratory bird patterns is

¹ We note that sea otter scientist Jim Bodkin has indicated that log transfer sites associated with the logging industry on the Kodiak archipelago may in fact have a negative impact on SADPS habitat. Although our groups did not identify this industry as one of concern in our original comments, we urge the FWS to assess the potential impacts of the logging industry and log transfer sites on the SADPS and any critical habitat designation.

entirely inadequate to provide protections for sea otters. In addition, the cited Bristol Bay Area Plan (*Id.* pg. 6) protects only tidelands in Bristol Bay, and protects less than 20% of these tidelands – therefore, this plan has only a small overlap with required PCEs for the SADPS. Other protections cited under oil and gas leases (*Id.* pg. 8) apply only to on-land activities, protecting “vegetation or ground surface.” While these measures may be critically important for other wildlife, they provide little protection for the SADPS whose primary habitat is in the nearshore coastal environment. Additionally, many measures cited by Alaska contain significant exemptions and discretionary provisions which greatly decrease any protection they might provide. Some examples include: “Impacts to identified wetlands must be minimized *to the satisfaction of the director*” (*Id.* pg. 8); “*Whenever practicable*, the preferred method for disposal . . . is by underground injection” (*Id.* pg. 10); “*Unless authorized by an ADEC permit*, surface discharge of reserve pit fluids and produced waters is prohibited” (*Id.* pg. 10).

In sum, the purportedly extensive protection measures provided by the state of Alaska are not targeted to protection of the SADPS, do not reflect identified PCEs, which the FWS is required to focus on in its designation, and overall are an inadequate substitute for critical habitat designation. Neither the purported conservation measures, nor the purported economic impacts, are identified with sufficient specificity to demonstrate that the benefits of excluding particular areas would be greater than the benefits of including these areas in the critical habitat designation.

Fisheries

Some commenters have used the statement of the FWS that existing commercial fishing activities in southwest Alaska do not have the potential to harm the identified physical and biological features for the SADPS as support for the exclusion of fisheries from all critical habitat designation. 73 Fed. Reg. 76454 (Dec. 16, 2008). However, the provided reason behind this statement is that the majority of commercial fishing occurs outside of areas proposed for critical habitat designation. Therefore, the economic impact on commercial fishing from critical habitat designation should be minimal, while the benefits of inclusion of proposed areas are great for the SADPS. In addition, we reference our comment above regarding the actual impacts of critical habitat designation. Because critical habitat designation will not by itself prohibit or even restrict fishing in critical habitat, but rather require an analysis to ensure that fisheries impacts will not in fact adversely modify critical habitat, these comments should be disregarded.

National Security Impacts

We are sensitive to the national security benefits of the Kodiak archipelago that the U.S. Navy requests be excluded. However, excluding the entire large area requested by the Navy is too blunt a measure and does not appropriately balance national security needs against SADPS protections. While this exclusion would allow the activities of the Navy to continue unimpeded, it would also allow potentially harmful activities of any other party to occur, such oil and gas or other human development. The more appropriate response is to require Section 7 consultations for national security activities that may affect critical habitat, like all other federal activities. To the extent that critical habitat may in fact slow other development activities, this approach may actually be more beneficial to both the sea otters and the U.S. Navy, as many of the Navy’s activities such as detonations or aircraft insertions require unpopulated, undeveloped areas. Furthermore, we note that the ESA was amended in recent years specifically to exempt from critical habitat designation lands or areas “owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan” prepared pursuant to the ESA. 16 U.S.C. § 1533(a)(3)(B)(i). Unlike other lands owned by the Department of Defense that are

excluded from critical habitat designations, to our knowledge the lands at issue here have no management plans in place to provide for the conservation of the sea otters.

Regarding the Navy's specific request for exclusion, we have become aware that Afognak and Kodiak Islands, both in Unit 5, are home to a significant population of sea otters. This population is known to number about 11,000 animals total, representing approximately 23% of the 47,676 sea otters currently estimated in the SADPS. NORTHERN SEA OTTER (*Enhydra lutris kenyoni*): Southwest Alaska Stock Assessment Report, U.S. Fish and Wildlife Service, August 2008. Due to the significance of this large area for the overall SADPS population, we urge the FWS to deny this specific requested exclusion and address the concerns of the Navy with the more refined tools provided by the ESA.

Alaska Native Concerns

Several Alaska Native groups submitted comments requesting exclusions from critical habitat designations. Requests for economic reasons have been addressed in preceding sections, but we re-emphasize here the lack of significant economic impact found in the DEA and the requirement that consideration of economic activities be limited to non-speculative ones. Other concerns of native groups focus on access to fisheries. As previously noted, FWS predicts very little overlap with commercial fisheries. Regarding subsistence fishing, designation of critical habitat in and of itself will not impact the availability of subsistence fishing. The primary, if any, restrictions on subsistence fishing derive from the listing of the SADPS and the resulting anti-take provisions of the ESA.

In previous critical habitat exclusions based on tribal requests, FWS has relied heavily on the existence or presence of HCPs or other management plans during its cost benefit analysis. None of the comments have identified any measures in place geared towards the conservation of the SADPS and the FWS should deny any requests for exclusions that do not specifically demonstrate that other enforceable measures will provide sufficient conservation for the survival and recovery of the species.

Lack of Benefits Analysis

Finally, we note that any lack of information about the benefits specific areas may provide for the SADPS should not provide the basis for exclusion under any cost benefit analysis, but rather should weigh in favor of a more precautionary approach. In addressing the areas that commenters requested to be excluded from critical habitat designation, biologists we consulted with noted three things (personal communication, Dr. Jim Estes, Dr. Tim Tinker, Jim Bodkin).

First, the onus should rest on the entities requesting exclusion of areas to provide FWS with spatially explicit locations that biologists can directly compare with areas of known sea otter occupancy (along with areas that are showing population declines). They then can create a model of this information to determine if there would be any concerns by excluding certain areas.

Second, the FWS should be wary of granting exemptions that would fragment critical habitat in a way that would be detrimental for the species and its recovery. By definition, the areas FWS has proposed for designation are those that contain the physical or biological features essential for the conservation of the species and which may require special management considerations. 16 U.S.C. § 1532(5)(A). Excluding areas such that critical habitat becomes a piecemeal exercise will not satisfy either the letter or intent of the ESA.

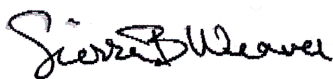
Lastly, FWS must consider the impacts of exclusions on connectivity. If areas are excluded based on requests to continue the ability to fish, conduct oil and gas exploration and development, and other human activities which may have impacts on the SADPS habitat, this assumes that activities conducted in one area won't have an affect on other areas that are connected. This is an incorrect assumption based on the concept of connectivity.

Conclusion

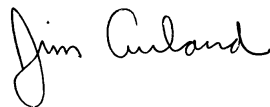
We encourage the FWS to follow the mandates of the ESA and provide for the protection of a species whose numbers have suffered a sharp decline in recent years. Adequate critical habitat protections are essential for the recovery of the SADPS. Given the minimal economic impacts predicted by the DEA, few, if any, exclusions can be justified by a cost-benefit analysis. This is particularly the case given that FWS has chosen to limit its proposed designation to areas currently occupied by the SADPS. The overall designation must provide for the recovery of the species and we fear that the agency at this point has allowed itself little room for error.

Thank you for your consideration of these comments. Please do not hesitate to contact us with any questions. We look forward to working with you throughout the critical habitat designation process and through further conservation efforts for the SADPS.

Sincerely,



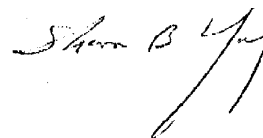
Sierra Weaver
Staff Attorney
Defenders of Wildlife



Jim Curland
Marine Program Associate
Defenders of Wildlife



Jennifer Covert
Program Manager
Friends of the Sea Otter



Sharon Young
Marine Issues Field Director
The Humane Society of the United States



Cindy Lowry
Director
Oceans Public Trust Initiative/IMMP